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Office - Supreme Court, U. S.
FILED
OCT 24 1941
CHARLES ELMORE CROPLEY
CLERK

No. 647

October Term, 1941

SUPREME COURT OF THE UNITED STATES

NEHEMIAH GLOVER,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

BRIEF OF THE STATE OF TEXAS

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BRIEF OF THE STATE OF TEXAS

To The Honorable The United States Supreme Court:

STATEMENT OF THE CASE

The petitioner was convicted of murder with malice, and his punishment assessed at death. Mrs. Lee, wife of the deceased, was ravished by the petitioner after her husband was murdered.

Petitioner made a confession in which he admitted the killing, but contended it was done in self defense. He claimed he was being attacked by the deceased with a sharp knife. On the trial of the case petition-

er denied having made the confession, and denied his signature on the confession. In addition to the officers who took the confession, the petitioner's wife, who was placed on the stand by him, testified that the signature to the confession was that of her husband.

No objection was made in the trial court to the introduction of the confession; no motion was made in the trial court to have the confession excluded from the jury; no complaint was made in the trial court in the motion for new trial, because the confession was admitted; no bill of exception was taken to the introduction of said confession, and the admission thereof was not complained of in the Appellate Court.

The only ground of jurisdiction claimed by petitioner in this cause is by reason of the admission in evidence of the alleged confession.

The respondent, State of Texas, submits that this court has no jurisdiction to hear and determine this cause, and if it does have such jurisdiction, there is no error in the record which would justify this court in reversing the judgment of the Court of Criminal Appeals in Texas.

Respondent presents the following Counter Points or Propositions:

First Counter Point

Petitioner not having in any way objected to the

admission of his confession in evidence, this court has no jurisdiction to review said question.

Second Counter Point

The confession of petitioner being offered in evidence cannot be complained of for the first time in the Supreme Court of the United States.

Third Counter Point

If there had been any objection made to the confession of petitioner, same should have been admitted in evidence, under the record in this case.

STATEMENT, ARGUMENT AND AUTHORITIES UNDER POINTS ONE AND TWO

On page 26 of his supporting brief petitioner states that the trial court appointed an attorney to represent petitioner. On page 27 of said brief he states that said attorney "was inadequately equipped by skill and experience to preserve the fundamental rights of petitioner."

The respondent, State of Texas, challenges that statement. There is absolutely no evidence that Mr. Mumme, the attorney who was appointed to represent petitioner, was not adequately equipped, or that he did not have the ability to represent the petitioner.

In addition thereto, the record shows affirmatively that S. B. Ehrenwerth also represented the petitioner —his name being signed to the amended motion for new trial in the trial court. (Tr. 22) While same does not appear in the record, it is a known fact that S. B. Ehrenwerth was and is an experienced lawyer.

On page 27 of petitioner's brief he states that there was no objection made, or exceptions preserved to the introduction of the alleged confession.

Again, on page 30 of petitioner's brief he states:

> "No request was made that the court defer his ruling until appellant (petitioner) might develop the matter further, and there is no question but that the trial court ruled correctly at the time the confession was offered in evidence."

Again, on page 31 of said brief petitioner states that he was a poor, ignorant and penniless man, and unable to secure counsel.

Respondent, State of Texas, challenges this statement, because there is no evidence to support said statement. While the record shows affirmatively that the court appointed LeRoy C. Mumme, an attorney, to represent the petitioner, the record also reveals that, S. B. Ehrenwerth, an experienced practitioner at the Houston bar, also represented the petitioner. (Tr. 22) Whether this representation was paid for or voluntary, the record is silent.

It appears from the statement of facts, as well as from petitioner's brief, that no objection was made to the introduction of the confession at the time. No motion was made after the defendant had testified to strike the evidence or exclude the confession from the jury. In the amended motion for a new trial in the trial court no complaint was made of the confession having been offered in evidence. (Tr. 15-22)

In the Court of Criminal Appeals no complaint was made at the action of the trial court in admitting the confession, and no bill of exception complaining of said admission was presented to said court; neither was there any bill of exception presented in any manner or way sugesting that the petitioner had any complaint of or exception to the introduction of said confession in evidence. (See Bills of Exception 1 to 7, Tr. 28-41—being the only bills of exception in the record).

The record reveals many circumstances, which pointed to the guilt of the petitioner. In her testimony Mrs. Lee positively identified the petitioner as the man who killed her husband. She testified:

"The next time that I saw the man that had killed my husband and assaulted me was at the showup at the police station. There were several other men in the showup there but I saw him. I recognized the man in the showup that had killed my husband and assaulted me there. Yes, sir, I see that man in the court room now. That is him there (indicating de-

fendant). That is the man, the defendant, that shot my husband, assaulted me and robbed his body there. That is the man, yes, sir. (Indicating the defendant). I am positive that is the man." (S. F. 20).

In the opinion of the Texas Court of Criminal Appeals it recites the following as a summary of the testimony:

"The testimony, briefly stated, shows that shortly after midnight on the 1st day of May, 1940, some one entered the home of John Frank Lee and his wife, apparently for the purpose of committing theft or robbery. After the belated and unwelcome visitor had entered the home, he discovered that Mr. and Mrs. Lee were awake and had discovered his presence. He killed Mr. Lee by shooting him with a .32 caliber automatic pistol, then ravished Mrs. Lee, took what money could be found and departed, leaving behind the empty shell from which the deadly missile had been fired. Mrs. Lee notified the officers who immediately responded to the call. During the time, or at least part of the time, that the intruder was in the home, a lamp was burning and Mrs. Lee could see the culprit distinctly. She gave the officers a reasonably accurate description of him. The empty shell found on the floor disclosed a peculiar mark in the nature of a horseshoe on the butt end thereof made by the recoil or pressure of the shell against the pistol. Some time later appellant was arrested as a result of the description Mrs. Lee had given to the officers. At the time of his arrest, appellant had a cartridge in his pocket which fitted a .32 caliber automatic pis-

tol. After being questioned relative to such a pistol he accompanied the officers to his home where a .32 caliber automatic pistol and a few shells were found. The officers fired the pistol several times and discovered that when fired it would make an impression on the butt end of the shell similar to or like that on the empty shell found in the room where the homicide was committed. Thereafter, appellant made a voluntary confession in which he not only admitted the commission of the offense but went into much detail concerning the location of the burning lamp, the bed, dresser, etc. Mrs. Lee positively identified appellant as the person who killed her husband and ravished her on the night in question." ..... S. W. (2d) .....

The court then discusses each of appellant's Bills of Exceptions Nos. 1 to 7, and overrules same. Neither of said Bills of Exception present any question relative to the introduction of the confession as made by the petitioner. The court in the final paragraph of its opinion states:

> "No objection to the court's charge was urged, nor was there any objection to the introduction in evidence of appellant's voluntary confession. However, we do not wish to be understood as intimating that the same was subject to any legal objection."

Article 667 of the Penal Code of Texas provides:

> "The defendant, by himself or counsel, may tender his bill of exceptions to any decision, opin-

ion, order or charge of the court or other proceedings in the case; and the judge shall sign such bill of exceptions under the rules prescribed in civil suits, in order that such decision, opinion, order or charge may be revised upon appeal."

The Court of Criminal Appeals in Texas has many times held, in construing the above statute, that it could not and would not consider any error alleged to have been committed by the trial court, unless same was preserved by a bill of exceptions.

In *Twitty* v. *State*, 34 S. W. (2d) 875, the defendant was convicted for the offense of rape and assessed the death penalty. After stating the substance of the testimony, the court used this language:

"(1-3) We find in the record no exceptions to the court's charge. No bills of exception are brought forward. It appears that an issue was raised as to the voluntary character of the confession. Said issue was properly submitted to the jury in the charge of the court. It further appears that the issue of insanity was submitted in the charge. * * * In the state of the record, no question except the sufficiency of the evidence is presented for review. The fact that the jury assessed the extreme penalty has led us to make a most painstaking examination of the evidence. The opinion is expressed that the evidence is sufficient to support the conviction."

In *Sheffield* v. *State*, 37 S. W. (2d) 1038, the Court of Criminal Appeals in Texas, in affirming the judgment of the trial court, used this language:

> "(1) In the brief filed for appellant we find many propositions advanced and questions suggested which are not raised by the bills of exception. We are necessarily restricted to a consideration of points brought forward by the bills."

The court then passed upon a number of bills of exception that were properly presented, and held that none of them presented reversible error.

In *McFarlin* v. *State*, 55 S. W. (2d) 844, the court in affirming a judgment, used this language:

> "(1-2) We find in the record no bill of exception complaining of any proceeding in the trial court. * * * Other points are raised and discussed the first time in the well-prepared brief filed by the attorney for appellant, but, in the absence of some complaint thereof in the trial court preserved by bills of exception, we are without power to consider these questions, which are not fundamental in nature."

It is therefore apparent that in the case at bar the Court of Criminal Appeals in affirming the judgment of the trial court, did not pass upon the question as to whether the confession of petitioner was wrongfully or rightfully obtained.

It is also, we think, equally true that the judgment of the trial court could be and was affirmed without the court's being required to pass upon admissibility of the confession. There was an abundance of testimony in the record, irrespective of the confession to uphold and sustain the judgment of the trial court.

The pistol cartridge found in petitioner's pocket, the pistol that was found at the petitioner's home, the identification by Mrs. Lee, the description given by her of the man at the time the crime was committed, and many other circumstances pointed to the guilt of the petitioner. As a matter of fact, no other evidence was needed except the positive identification of the defendant by Mrs. Lee. The Court of Criminal Appeals in its opinion stated that the petitioner had not excepted to the introduction in the evidence of the confession, and had not in any manner called into review, either in the trial court or in the Appellate Court the action of the trial court in admitting said confession in error.

In *Southwestern Bell Telephone Co.* v. *State of Oklahoma*, 303 U. S. 206-213, 82 L. Ed. 751, this court, in refusing to review the action of the court of Oklahoma, because no Federal question had been necessarily passed upon by the State court, used this language:

> "(Headnote 2) We have repeatedly held that it is essential to the jurisdiction of this court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to that determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it. (Cites a long list of authorities) Apply-

ing this rule, the motion to dismiss must be granted."

In *Lynch* v. *New York, ex rel Pierson*, 293 U. S., 52-55, 79 L. Ed. 191, this court, in dismissing for want of jurisdiction a writ of certiorari, used this language:

> "(Headnote 3.) It is essential to the jurisdiction of this court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. (Cites a number of authorities) Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this court will not take jurisdiction." (Cites a number of authorities).

It is therefore respondent's position that in this case the petitioner has not shown any jurisdictional ground why this writ should be granted, or why this court should interfere with the judgment of the court of last resort in the State of Texas.

STATEMENT, AUTHORITIES AND ARGUMENT UNDER POINT NO. THREE

Respondent submits that if the question had been properly raised, there was and is no error on the part of the trial court in admitting in evidence the confession as made by petitioner. While it is true the petitioner testified that he was on various occasions whipped and kicked and cuffed about and beat upon by the officers while in jail, he also testified that he had never seen the confession before it was offered in evidence, and that it was not his signature; that he could not even write his name. (S. F. 61). Again, he testified:

> "I don't know who signed it (the confession) I tell the jury that I can't write at all, I say I can't write at all, No, Sir." (S. F. 76).

He further testified that he did not sign an order to let the cafe man have fifty-three cents; that the signature on said order was not his signature. (S. F. 76)

He further testified:

> "I tell the jury I didn't sign this signature on the bottom, Nehemiah Glover. That is not my signature on the statement." (S. F. 77)

He testified that at the time he was being whipped and mistreated by the officers, "they didn't try to make me make a statement. They kicked me in the

stomach. They were not taking a statement from me, No, Sir." (S. F. 72).

All through his testimony the petitioner denied having discussed making a confession, and denied having made one, and denied having been forced to make a confession, and denied his signature.

Loretta Glover, petitioner's wife, testified that the signature to the order given to the cafe man was signed by the petitioner; that he also signed the confession. On direct examination by his attorney, Mr. Mumme, she testified she was positive the signature to the confession was that of her husband. (S. F. 83)

All of the officers who were in any way connected with taking the petitioner's confession specifically denied that they mistreated or abused or whipped petitioner; that, of course, simply raises a question of veracity between the petitioner and the officer.

In his testimony the petitioner claimed that he was not at the place on the night the crime was committed, and testified that he was at certain homes and houses and places; the parties who lived at those respective places contradicted that testimony and said he was not there. When the testimony of petitioner is read, he has so many contradictory and unbelievable statements therein, that the jury was well justified in disregarding all of his testimony.

We, of course, recognize that in this character of a

suit this court is not bound by the testimony of the officers; neither is this court bound by the finding of the jury, or the finding of the Court of Criminal Appeals in Texas. This court has the power to disregard all testimony favorable to the verdict and the judgment, and substitute its own conclusions and findings of fact. *Lomax* v. *State of Texas*, No. 729, October term, 1940 by this court.

In the case at bar, however, respondent submits that there is no substantial evidence that the confession in question was obtained by any fair or foul or unfair method. There is no question about the defendant's guilt. He committed a brutal murder, and then committed a most heinous crime in ravishing the wife of the man he had killed, while the dead man was lying on the floor by the bed. The petitioner was given a fair trial; the court appointed counsel to represent him. In addition, he either employed other counsel, or, at least, had the advantage of other experienced and able counsel; the petitioner is now under indictment for a dozen other capital offenses of the laws of Texas; the people have permitted the matter to be submitted to the courts; the courts have acted in all respects in conformity to law. This court, we submit, has no jurisdiction, to hear and determine the case, and if it does have jurisdiction, the judgment of the Court of Criminal Appeals in Texas should be in all things affirmed. Under the record as presented, as well as under the record as it actually exists, no other judgment could possibly be rendered, if justice is in fact meted out to petitioner.

WHEREFORE, respondent, State of Texas, prays that this cause be dismissed. In the alternative, it prays that the judgment of the Court of Criminal Appeals of Texas be in all things affirmed.

Respectfully submitted,

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